Supreme Court, U.S.
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No. 07-960

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

STATE OF OHIO,

Petitioner,

v.

BRIAN K. SILER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION

OFFICE OF THE OHIO PUBLIC DEFENDER

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QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 1354 (2004), this Court held that the prosecution's presentation of testimonial hearsay from an unavailable declarant violated a criminal defendant's Confrontation-Clause rights. Two years later, construing *Crawford*, this Court held that when police questioning is concerned primarily with eliciting facts about past events, statements obtained pursuant to such questioning must be deemed testimonial, and thus cannot be used by the state in criminal prosecutions. *Davis v. Washington*, 547 U.S. 813 (2006).

Given that the declarant herein was subjected to over ninety minutes of questioning by a homicide detective, the question in this case is whether the Ohio Supreme Court correctly applied *Crawford* and *Davis* when it held that testimonial hearsay statements of the lone potential eyewitness should not have been presented to the jury.

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BRIEF IN OPPOSITION

Pursuant to a remand from this Court on the basis of *Crawford v. Washington*, both the Ohio Court of Appeals and the Ohio Supreme Court determined that Respondent Brian K. Siler's Confrontation-Clause rights were violated at trial. The state courts reached this conclusion through reliance on the holdings in *Crawford* and in *Davis v. Washington*. Reliance on *Davis*, in particular, was appropriate, because the scenario there is the same as that presented herein: a state's witness is interrogated by a police officer, which officer later recounts to the jury the testimonial hearsay statements of an eyewitness or purported eyewitness. As the Ohio Supreme Court has correctly applied two very recent and unequivocal holdings issued by this Court to a factual scenario that is not distinguishable from that presented in *Davis* in any meaningful way, it is difficult to fathom why this petition is before the Court.

OPINIONS BELOW

On December 6, 2004, this Court granted Mr. Siler's Petition for Writ of Certiorari to the Ashland County, Ohio, Court of Appeals, which vacated the appellate court's prior judgment, and remanded for further consideration in light of *Crawford v. Washington*. *Siler v. Ohio*, 543 U.S. 1019, 125 S.Ct. 671 (2004). The subsequent decision of the Ohio Supreme Court appears at A-1 of the Appendix to the Petition for Writ of Certiorari. The decision of the Ohio Court of Appeals appears at B-1 of the Appendix to the Petition.

JURISDICTIONAL STATEMENT

The Ohio Supreme Court issued its decision on October 25, 2007. Petitioner appears to have timely filed its petition.

The State of Ohio has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which provide in pertinent part:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the spring of 2001, marital tensions arose between Brian Siler and Barbara Siler. The couple had married in 1988, and had their only child, Nathan, in 1998. After a two-week separation, the couple separated permanently at the end of July 2001, immediately following a domestic dispute that initially resulted in no charges against either Mr. or Mrs. Siler. Mr. Siler went to live at his brother and sister-in-law's house, while Mrs. Siler remained in the marital residence with their son, Nathan.

On September 20, 2001, Mrs. Siler's body was found hanging in her garage. The house showed signs of forced entry. Nathan was present at the house, sleeping in his bed, when the body was discovered at approximately 2 p.m. Mr. Siler was interviewed by sheriff's deputies that same day, having initially waived his Miranda rights. He stated that he had no knowledge

of, or involvement in, Mrs. Siler's death. He recounted that he had spent the prior evening with his brother finishing some drywall, went to bed, saw his sister-in-law in the middle of the night after he used the bathroom, and arose early the next morning for a job interview in Columbus, which he arrived at no later than 9:20. Accordingly, Mr. Siler filed a notice of alibi at trial.

Twenty minutes after Deputy Singleton arrived and found Mrs. Siler, Ashland County Sheriff's Detective Larry Martin arrived at the scene. Detective Martin first spoke to Nathan Siler at around 2:20 p.m. on September 20, 2001, more than eight hours after the latest possible time of death established by the coroner. By that time, Deputy Singleton and Captain Richert had secured the scene and ensured the safety of people present. Already several law enforcement personnel were on site conducting the investigation and taking photographs. Upon Detective Martin's arrival, he was briefed by Captain Richert. Detective Martin then viewed and photographed the scene, and started questioning Nathan approximately 20 minutes after he arrived at the scene. Detective Martin's primary function when questioning Nathan was to investigate, not to secure the scene.

Sheriff's Deputy Ron Singleton had already attempted to talk to Nathan without success. Nathan also initially did not want to talk to Detective Martin. According to Detective Martin, Nathan did not appear to be in any distress, was not excited, did not appear to be nervous, and was not upset. Detective Martin agreed that Nathan appeared "at ease." Detective Martin initially questioned Nathan for 30-45 minutes. After questions about Nathan's interests and his going to the fair the night before, Detective Martin asked him if "after he got home, did anything scare him," "how daddy scared him," and "did anything else scare him."

After 30 to 45 minutes of questioning, a family friend took Nathan from the scene and bought lunch for him. When Nathan returned, Detective Martin resumed questioning for another

hour while Nathan intermittently played with other children. Detective Martin repeated the questions about what had scared Nathan after the fair. He then asked "where they were fighting at, who was hurting mommy." Detective Martin next handed a teddy bear to Nathan and asked him if he could show Detective Martin "by using the teddy bear how daddy was hurting mommy," which Nathan did not do. Then Detective Martin began holding a children's services investigator in "different positions, grabbing her wrist, her arms, bear hug," to demonstrate how Mr. Siler might have hurt Mrs. Siler. After demonstrating numerous positions, Detective Martin put his arm around the investigator's neck, and asked Nathan "like that?" Nathan was said to have responded yes and to have begun to cry. Finally, Detective Martin asked Nathan "who put the yellow thing around mommy?" Nathan is said to have responded that it was his father.

Defense counsel objected to Detective Martin's testimony about Nathan's responses to the questioning. This objection renewed the standing objection made during the testimony of Deputy Singleton concerning Nathan's statements. The court overruled the renewed objection, explicitly relying on its earlier ruling that Nathan's statements were excited utterances. At the conclusion of Detective Martin's testimony, defense counsel moved for a mistrial, citing the prejudice resulting from the erroneous admission of Nathan's hearsay statements. The court summarily overruled the motion.

The State's forensic pathologist testified as to cause of death, opining that Mrs. Siler died of cervical compression, inconsistent with hanging. Dr. John Pless, a former county coroner and a professor of pathology at Indiana University's medical school, testified that Mrs. Siler had hung herself. In his direct appeal, Mr. Siler raised numerous assignments of error. His first assignment of error claimed that the trial court's admission of Detective Martin's recollections of Nathan Siler's statements made in response to his extended questioning violated the

Confrontation Clause of the United States Constitution. Mr. Siler argued the statements were not excited utterances, nor were they admissible pursuant to *Ohio v. Roberts*, 448 U.S. 56 (1980). The Court of Appeals overruled the first assignment of error, concluding that the statements were excited utterances and properly admitted. *State v. Siler I*, Ashland App. No. 02-COA-028, 2003-Ohio-5749.

Mr. Siler filed a timely notice of appeal and memorandum in support of jurisdiction in the Ohio Supreme Court. He again raised the claim that admission of Nathan's statements to police violated his rights under the Confrontation Clause. The Ohio Supreme Court denied review of Mr. Siler's case without opinion on March 24, 2004. *State v. Siler*, Ohio Supreme Court Case No. 2003-2106, reported at 101 Ohio St. 3d 1489, 2004-Ohio-1293.

Following a timely, unsuccessful request for reconsideration in light of *Crawford v. Washington*, Mr. Siler filed a timely petition for writ of certiorari in the United States Supreme Court, arguing that the Court should vacate the decision and remand to the Court of Appeals for further consideration in light of the decision rendered in *Crawford*. The questions presented to this Court were as follows: 1) "Are an accused's rights under *Crawford* and the Confrontation Clause violated when state courts characterize statements that are the end result of a one and a half-hour police interview as an excited utterance?" and 2) "Under the rule set forth in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), does the Confrontation Clause allow the admission into evidence of a statement made by a purported eyewitness in response to police questioning when the eyewitness is three years old, incompetent to testify, and thus unavailable for confrontation?"

On December 6, 2004, this Court granted the petition, vacated the appellate court's prior judgment, and remanded for further consideration in light of *Crawford v. Washington*. *Siler v. Ohio*, 543 U.S. 1019, 125 S.Ct. 671 (2004).

On remand, Mr. Siler raised the following error: "The trial court erred in permitting Nathan Siler's hearsay statements to Detective Martin to be admitted as excited utterances, thereby depriving Mr. Siler of his right to confront witnesses, as guaranteed by the 6th and 14th Amendments, U.S. Const." The Ashland County Court of Appeals concluded that "Detective Martin's questioning of the child, although resulting in allowable 'excited utterances' under the Ohio Rules of Evidence, was nonetheless a structured police interrogation as envisioned in *Crawford* and therefore constituted testimonial evidence." *State v. Siler II*, 164 Ohio App. 3d 680, 2005-Ohio-6591, at ¶ 49. The appellate court found that the error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

The State of Ohio sought the review of the Ohio Supreme Court. The issue before that court was "whether a child's statements made in the course of a police interrogation to a sheriff's deputy should be considered testimonial or nontestimonial." *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, at ¶ 2. The case was briefed and argued, and the Ohio Supreme Court's decision followed and applied *Davis v. Washington*, concluding that the police interrogation did in fact produce a testimonial statement. Id., at ¶¶ 24, 43-46.

REASONS FOR DENYING THE PETITION

Because the ruling of the Ohio Supreme Court does not contravene the Confrontation Clause, and because it follows and correctly applies this Court's recent precedents, the petition should be denied. Nothing in *Crawford* or *Davis* suggests that this Court intended to create—or encourage the state courts to create- new, slippery-slope categories of exceptions that would erode or swallow the recently restored Confrontation-Clause rights that are guaranteed by the Sixth Amendment. Yet that is precisely what the State of Ohio seeks here, by suggesting that

somehow statements of young declarants should be treated differently from those of every other declarant.

Less than two years ago, this Court created a boundary between police questioning that results in testimonial statements and that which produces nontestimonial statements. *Davis v. Washington* (2006), 547 U.S. 813, 126 S. Ct. 2266. A statement made in response to police questioning is "testimonial when the circumstances objectively indicate there is no [ ] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to the criminal prosecution." *Davis*, 126 S.Ct at 2273-74. Police interrogation "solely directed at establishing facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" fall squarely within the class of testimonial hearsay subject to the Confrontation Clause. *Davis*, 126 S.Ct. at 2276.

The petition proclaims that "[t]he instant case is similar to *White v. Illinois*, 502 U.S. 346 (1992)" a case involving spontaneous declarations of a child to a multitude of individuals, including a police officer. Given that over 90 minutes of police interrogation occurred in this case, there is, in fact, no similarity whatsoever between this case and *White*.

As was concluded by the Ohio Supreme Court, the purpose of Detective Martin in interviewing Nathan Siler was to obtain information about the death of Barbara Siler. Hence, the reenactment of various violent scenarios for Nathan's benefit, the extended nature of the questioning, and the repeated covering of the same investigational ground. As such, any statements obtained from Nathan were testimonial. Presenting the statements to the jury in the words of the law enforcement officer, without any opportunity to examine the declarant about the statements, violated Mr. Siler's Confrontation Clause Rights.

Neither *Crawford* nor *Davis* even suggests that the age of the declarant would be relevant to determining whether testimonial statement were provided to an interrogating officer. In fact, an opportunity to leave that door open was presented during the *Davis* opinion's brief discussion of *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), wherein a youthful crime victim's statements to her mother were at issue. Rather than inserting a simple footnote that could have observed that *Brasier*'s youthful declarant's statements might be subjected to a different analysis than those of the adult declarant in *Davis*, the opinion of the Court did not even address the issue. Given that this Court is well aware that unavailability to testify is often the result of the age of the declarant, the lack of any signal whatsoever that the age of the declarant may be relevant cannot be deemed a mere oversight, or an indication that the issue is rare or obscure.

There are at least two reasons why it is unsurprising that there was no suggestion of a possible later focus of this Court on the age of the declarant. First and foremost is the fact that there is absolutely no common-law antecedent for the proposition that a criminal defendant should lose his right to confront witnesses against him merely because the accuser is below a certain age. At the time of the drafting and adoption of the Bill of Rights, the position put forth here by the State of Ohio was applied in no court of law, or even contemplated as a possible exception to the right to confront one's accusers.

Discussion of the second reason—if another is even needed—requires that we first assume, *arguendo*, that through torturous gymnastics of law and reason[1] the conclusion could be reached that children's accusatory statements are "non-testimonial," thus their use in court without the opportunity for cross-examination would be permitted under the Sixth Amendment.

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[1] The gist of such gymnastics would be that children's statements are not testimonial because they do not know what they are doing or saying. Which, of course, begs the question: if they do not know what they are doing or saying, why is it appropriate to use their words—in an unchallengeable manner—as the basis for criminal convictions that can result in execution or, as here, a lifetime of imprisonment?

As a practical matter, under this theoretical scenario, it would be impossible to create a meaningful divide between children whose statements must be deemed testimonial and children whose statements must be deemed non-testimonial. Further, by logical extension there would also have to be a similar treatment for government witnesses of limited mental abilities, who would also be unable to comprehend that they were offering statements that might be later used in court in a criminal proceeding. Thus, following the State of Ohio's logic, there would also have to be created a dividing line based on the I.Q. of the declarant, as certainly declarants of low I.Q. are no more able to comprehend the workings of the justice system than are children. It does not require extended analysis or argument to establish that the state's desired approach to the testimonial hearsay statements of children, in addition to violating the Sixth Amendment, would result in insurmountable problems in application.

CONCLUSION

The Supreme Court of Ohio correctly followed this Court's recent Confrontation Clause precedents, thus there is no question presented that warrants the Court's attention. Further, the State of Ohio lacks either historical or logical support for its notion that the testimonial hearsay statements of a government witness can be admitted without violating the Confrontation Clause of the Sixth Amendment. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jill E. Stone, a member of the Bar of this Court, hereby certify that on this 22nd day of February, 2008, a copy of the foregoing BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and AFFIDAVIT OF INDIGENCY were sent by first class U.S. Mail, pursuant to Rule 29.3, to Ramona F. Rogers, Ashland County Prosecutor, 307 Orange Street, Ashland, Ohio 44805. I further certify that all parties required to be served have been served.

Jill E. Stone

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